

NO. PD – 1079 – 19

FILED
COURT OF CRIMINAL APPEALS
8/10/2020
DEANA WILLIAMSON, CLERK

IN THE TEXAS COURT OF CRIMINAL APPEALS

WILBER ULISES MOLINA
Appellant,

v.

THE STATE OF TEXAS
Appellee.

**On Appeal From The First District Court Of Appeals, Houston, Texas
No. 01 – 18 – 00317 – CR**

and

**On Appeal From The 338th Judicial District Court
Harris County, Texas
Trial Court Case No. 1433542**

APPELLANT’S BRIEF ON THE MERITS

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NO ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Under Rule 68.4(a), Texas Rules of Appellate Procedure, the following is a complete list of the names and addresses of all parties to the trial court's final judgment, and their counsel in the trial court, as well as appellate counsel, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision and so the Clerk of the Court may properly notify the parties or their counsel of the final judgment and all orders of the Texas Court of Criminal Appeals.

1. **Trial Court:** The 338th Judicial District Court of Harris County, Texas, 1201 Franklin, Houston, Texas 77002; The Honorable Judge Ramona Franklin presided.

2. **Appellant:** Wilber Ulises Molina, TDJC# 02194033, Alfred Hughes Unit Rt. 2 Box 4400 Gatesville, Texas 76597.

3. **Counsel for Appellant on Trial:** Mario Madrid, Esq., 440 Louisiana St #1225, Houston, TX 77002.

4. **Counsel for Appellant on Appeal:** Juan M. Contreras, Jr., 10223 Broadway, Suite P, Pearland, Texas 77584; Derek H. Deyon, P.O. Box 8145, Houston, Texas 77288.

5. **Counsel for State of Texas at Trial and Appeal:** Kim Ogg, Harris County District Attorney; Chris Handley and Daniel McCrory Harris County Assistant District Attorney, 500 Jefferson St Suite #600, Houston, TX 77002.

/s/ Derek H. Deyon

DEREK H. DEYON
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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant submits this brief on the ground set forth in his Petition for Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is requested because this court's decisional process can be accomplished on the briefs alone.

STATEMENT OF THE CASE

A jury found Appellant guilty of aggravated sexual assault and assessed his punishment at 55 years of confinement. On August 29, 2019, the First District Court of Appeals for Texas issued a Majority Opinion affirming Appellant's conviction. On August 29, 2019, Justice Julie Countiss issued a Dissenting Opinion. On May 7, 2020, the Court of Criminal Appeals granted Appellant's Petition for Discretionary Review.

ISSUE PRESENTED

- I. Whether the majority opinion conflicts with *Burch v. State*, when the majority opinion affirmed the trial court's admission of DNA testimony over Appellant's Confrontation Clause objection? Yes.

STATEMENT OF FACTS

On February 27, 2000, Tiffany Trosclair, complainant, visited Houston with her friends for the rodeo. In the early morning hours of their first night, Ms. Trosclair and her friends drove to a local restaurant to use the restroom. As they left the restaurant, they were approached by an individual in the parking lot, who asked for a

cigarette. The same man then pulled a gun on complainant and forced her into her car as other males appeared and also entered complainant's car. The complainant's friends quickly exited the vehicle and ran away to escape, leaving complainant behind. The men then trapped complainant inside the vehicle, placed her in the backseat, and drove away.

The individuals spoke Spanish to each other. The individual in the backseat told complainant to remove her jewelry. The individual in the back seat then demanded oral sex. The individual in the backseat then forced Ms. Trosclair to perform oral sex on him. He also started pulling off complainant's pants and began to engage in sexual intercourse with complainant before the driver told him to stop.

Later, the complainant could hear another car pull up with more individuals. The driver of the other car was anxious to remove the tires and rims from complainant's vehicle. Complainant told the driver to leave her and take the car but he said he only wanted the wheels. The individual in the back seat then placed a gun against complainant's leg.

Ms. Trosclair then heard the car door open and she was pulled out of the car by one of the individuals and told to get on her knees. One individual began to remove her clothes while another demanded oral sex. Another began to simultaneously engage in sexual intercourse with the complainant. They then

started to change places. The driver was working on removing the wheels from her car.

Her clothes were never completely removed. The individual from the backseat of the car had ejaculated during the oral sex. They did not try to clean her up nor remove any semen from her clothing. Once the driver had removed her wheels from the car he was ready to leave. She believed there were at least three different individuals who sexually assaulted her during the evening.

The driver then instructed her not to remove her blindfold until they were gone and she couldn't hear the other car any longer. After a while she finally heard the other car drive away. She then removed the blindfold and saw that she was in a soccer field. Ms. Trosclair began searching for a phone to call the police.

The police arrived and took complainant to the hospital. Ms. Trosclair was immediately taken to a room and a nurse explained that they were going to do a "rape kit". The nurse took complainant's clothing and complainant eventually left the hospital in scrubs along with her parents. Ms. Trosclair was never able to get a good look at any of the individuals in the vehicle and therefore was unable to identify any of the suspects at any time nor in any way whatsoever.

Years later, Appellant was prosecuted for aggravated sexual assault based solely on the DNA profile created in the Reliagene laboratory, however, Appellant was never permitted an opportunity to confront or cross – examine any of the

analysts from Reliagene who produced the only evidence which incriminated him in this offense during trial. The State instead chose to present that evidence to the jury through the testimony of Dr. Lloyd Halsell, a witness with no actual knowledge of how that evidence was created and thus cleverly shielded such evidence from any possible attack by the defense. In doing so, the State deprived Appellant of his constitutionally guaranteed right to confront his accusers. A jury later found Appellant guilty and Appellant was sentenced to 55 years in prison.

SUMMARY OF THE ARGUMENT

The Majority Opinion conflicts with *Burch v. State* because the Majority Opinion affirmed the trial court's admission of DNA Testimony over Appellant's Confrontation Clause objection.

ARGUMENT

In *Burch v. State*, the Texas Court of Criminal Appeals held that the admission of a laboratory report and the reviewing analyst's testimony violated the criminal defendant's right to confrontation. 401 S.W.3d 634, 637 – 38 (Tex. Crim. App. 2013). (“Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against.”).

Here, the Majority agreed that the trial court properly excluded the Reliagene report. The Majority, however, affirmed the trial court's admission of Dr. Halsell's testimony, which was based on the excluded Reliagene report. The Majority then held

that the computer – generated DNA data from the Reliagene report is not testimonial, and the Confrontation Clause thus does not bar a testifying expert from relying on it even though the persons who accumulated the data do not take the stand and are not subject to cross – examination.

However, Dr. Halsell rendered an expert opinion using raw computer – generated DNA data and also testified directly from the excluded Reliagene report. The Dissent argued that the trial court excluded Reliagene’s “Forensic Test Results” report but it allowed Dr. Halsell to testify about all of the DNA evidence, including data and analysis from the excluded Reliagene’s “Forensic Test Results” report. The Dissent then correctly concluded that Dr. Halsell’s DNA testimony violated the Confrontation Clause.

Dr. Halsell possessed no personal knowledge about any aspect of Reliagene or personal knowledge concerning the company’s processes and procedures. Dr. Halsell’s testimony concerning the contents of the excluded Reliagene report only circumvented Applicant’s constitutional right of confrontation. In short, it was pointless to exclude the Reliagene report on confrontation grounds when Dr. Halsell could simply present the contents of the excluded report to the jury without giving Applicant the right to confront any witness that actually prepared the report or had personal knowledge concerning the report.

PRAYER

Appellant prays that this honorable court reverse the majority opinion issued by the First Court of Appeals of Texas and order that this case be remanded back to trial

court with the exclusion of the Dr. Halsell's DNA testimony based on the excluded Reliagene report.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, a true and correct copy of the foregoing document was served on all counsel of record to:

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CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that this document contains approximately 1186 words and is under the maximum word count allowed by this court.

/s/ Derek H. Deyon

DEREK H. DEYON

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